

STATE OF MICHIGAN
COURT OF APPEALS

ARTCO CONTRACTING, INC.,

Plaintiff-Appellant,

v

THOMAS M. KERANEN & ASSOCIATES, P.C.,
FEDERLEIN & KERANEN, P.C., THOMAS M.
KERANEN, MARIA J. RILEY, f/k/a MARIA J.
BERNARD, and J. CHRISTIAN HAUSER,

Defendants-Appellees.

UNPUBLISHED

May 15, 2007

No. 274155

Oakland Circuit Court

LC No. 2006-071662-NM

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this legal malpractice action. Because genuine issues of material fact exist regarding defendants' alleged negligence and proximate causation, we reverse and remand.

I

The parties do not dispute the substantive facts, and the trial court set them out as follows:

This legal malpractice action arises from the Blue Water Bridge construction project. The Blue Water Bridge connects the United States to Canada. The construction project involved improving US [sic] roadways and the US Customs Plaza and the construction of several buildings. MDOT [the Michigan Department of Transportation] hired Toebe Construction Company as the general contractor for the project. In 1991, Toebe entered into a subcontract with Plaintiff for the construction of the buildings. The Subcontract provided that all claims for additional compensation be presented by the principal contractor on behalf of the subcontractor and that the subcontractor shall be bound by the determination of MDOT and be entitled to only its proportionate share of any net recovery. In 1992, Plaintiff entered into a Surety Agreement with Insurance Company of North American [sic] [INA]. The Surety Agreement provided that in the event of a

default, any rights that Plaintiff had under the Subcontract were assigned to the surety. During the construction project disputes arose between Plaintiff and MDOT. Plaintiff defaulted on its subcontract and was removed from the project. In 1996, Plaintiff's surety informed Plaintiff that it would take over performance of the subcontract and that claims for contract extras and disputes would be handled by INA. On April 10, 1997, INA agreed to relinquish control over Plaintiff's legal claims. On May 16, 1997, Toebe submitted an administrative claim to MDOT seeking payment for additional work performed. While this claim was pending, Plaintiff sued Toebe for the alleged failure to pay Plaintiff for work on the project. This lawsuit was resolved on March 22, 1999, when Toebe and Plaintiff entered into an Agreement for Joint Presentation of Claims. MDOT subsequently denied the claim and the administrative appeal was also denied. Plaintiff and Toebe then sued MDOT in the Court of Claims. The Court of Claims ruled the [sic] MDOT properly denied the claim both on the merits and because it was filed untimely. The Court of Appeals affirmed.

Plaintiff brought the instant lawsuit against Defendants. Defendant Thomas Keranen provided legal representation to Plaintiff during the project as a member of Defendant law firms. Defendants Riley and Hauser were employed by Defendant law firm during its representation of Plaintiff. Plaintiff alleges that Defendants were negligent by failing to timely file a claim for the additional compensation for the work performed during the project. In addition, Plaintiff . . . argues that Defendants were negligent in allowing Plaintiff to settle the Toebe lawsuit and . . . sought permission to amend the Complaint to include this allegation. Th[is] Court denied the motion to amend without prejudice pending . . . [the] summary disposition motion.

The trial court granted defendants' motion for summary disposition reasoning that:

[S]ummary disposition is appropriate because Plaintiff's claim for additional compensation was lost on April 6, 1997, while its surety INA still controlled its rights pursuant to the Surety Agreement. Defendants did not have a right to pursue a claim on Plaintiff's behalf until after INA relinquished its rights on April 10, 1997. The Court finds that Plaintiff has failed to provide any evidence that Defendants did anything which caused the loss of the additional compensation claim.

The trial court simultaneously denied plaintiff's motion for leave to amend its complaint, stating as follows:

In addition, the Court finds that the proposed amendment to the Complaint would be futile because Plaintiff did not have a right to recover monies from Toebe unless and until Toebe received payments from MDOT for the additional work. Because the claims for additional compensation were denied, Toebe did not receive any payments. Therefore, the Court finds that Plaintiff cannot establish a causal link between the settlement of the Toebe lawsuit and any alleged damages.

Subsequently, plaintiff filed a motion for reconsideration of the trial court's opinion and order. Under order of the court, defendants filed a response to plaintiff's motion for reconsideration. Plaintiff filed a motion seeking to be permitted to file a reply brief, which the trial court denied. Plaintiff subsequently moved to strike defendants' response to its motion or in the alternative to be permitted to file a reply brief, arguing that defendants had impermissibly expanded the lower court record in their responsive filing. The trial court denied plaintiff's motions. This appeal followed.

II

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition before the completion of discovery. We review de novo a trial court's grant or denial of summary disposition. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a trial court's decision to grant a motion for summary disposition, we "consider[] the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The court should grant the motion only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff's complaint alleges that defendants filed its claim for additional compensation from MDOT at the earliest on May 16, 1997, rendering it untimely and thereby proximately causing injury in the form of an inappropriate denial of its claim. Plaintiff cites no legal authority in support of its position and makes only cursory assertions in support of its claims. In general, "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citation and quotations omitted). But, because the record is sufficient for this Court's de novo review, we will address the merits of this issue.

Generally, in order to prevail on a cause of action for legal malpractice, a plaintiff must prove the following elements: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). In order to establish proximate cause, a plaintiff must first show that a defendant's action was a cause in fact of the claimed injury. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586-587; 513 NW2d 773 (1994). Therefore, a plaintiff must show that but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. *Id.* This is the "suit within a suit" requirement in legal malpractice cases. *Id.*

In general, it is inappropriate for a circuit court to grant summary disposition under MCR 2.116(C)(10) before the parties have completed discovery. *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002). However, "[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522

NW2d 707 (1994). A grant of summary disposition is proper where further discovery would be unlikely to uncover factual support for the non-moving party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Here, plaintiff correctly asserts that the trial court granted defendants' motion for summary disposition prior to the date that discovery was set to close. In support, plaintiff argues that the affidavit of its president, David Steffes, that it submitted in response to defendants' motion for summary disposition, raised sufficient questions of fact to warrant denial of defendants' motion.

Regarding the negligence element, the record indicates that two obstacles prevented plaintiff from timely pursuing its claim for additional compensation from MDOT before the deadline for such claim had passed. First, the subcontract between plaintiff and Walter Toebe Construction Company, the contractor on the project, provided that Toebe alone had the right to pursue any claims by plaintiff against MDOT. Therefore, plaintiff was not authorized to pursue its claim individually against MDOT without an express agreement to the contrary. Second, because plaintiff had defaulted on the construction project, it had "tender[ed] to . . . [Insurance Company of North America (INA)] performance of the contract and all of . . . [its] rights thereunder." Thus, plaintiff had given up its right to pursue additional compensation to its surety as a condition of its default, and could not do so without an express release of INA's exclusive right.

But the facts show that plaintiff eventually overcame both of these obstacles. On April 10, 1997, INA gave up its exclusive right to pursue plaintiff's claim with MDOT. Subsequently, on March 22, 1999, plaintiff and Toebe entered into an agreement wherein Toebe agreed to present plaintiff's claim to MDOT in accordance with its internal claim procedures and, if necessary, to institute litigation on Toebe's and plaintiff's behalf. The contractual obstacles posed by the subcontract between the parties were resolved.

It is defendants' position that they were not negligent due to the obvious obstacles posed because of the timeline involved in the case. Defendants specifically argue that:

[d]espite the fact that INA did not relinquish its control over Artco's claim until April 10, 1997, more than 120 days after the latest possible date that could be considered the "project completion date," and despite the fact that Toebe did not grant plaintiff the right to pursue its joint claims with Toebe until March 1999, Artco nevertheless sued defendants for legal malpractice for their alleged failure to timely file Artco's claim against MDOT.

Defendants' assertion would be a proper ground for summary disposition of the negligence issue if they had entered into an attorney-client relationship with plaintiff after the deadline for plaintiff's claim to be timely filed had passed. See, e.g., *Estate of Mitchell v Dougherty*, 249 Mich App 668, 682; 425 NW2d 472 (2002). However, defendants acknowledge that they had a long-term attorney-client relationship with plaintiff that spanned the undisputed timeline of events leading up to plaintiff's failure to timely file its claim with MDOT. In fact, the record shows that defendant Thomas Keranen, acting as plaintiff's legal counsel, negotiated the agreement with INA by which it gave up its exclusive right to pursue plaintiff's claim with MDOT, but did not meet with INA for this purpose until four days after plaintiff's potential right to pursue the claim was lost. Nothing in the record explains the delay. Similarly, defendant

Federlein & Keranen negotiated the agreement with Toebe under which Toebe agreed to pursue plaintiff's claim with MDOT in exchange for settlement of the pending lawsuit between the parties.

The record is void of an explanation for the reason that defendants chose to institute a lawsuit against Toebe, which resulted in a delay that deprived plaintiff of any right to pursue its claim, rather than to enter into timely negotiations with Toebe in order to achieve its desired result as it did with INA. A question of fact exists on this record regarding the assertion of defendants' negligence for the failure to timely file plaintiff's claim. Because timeliness issues existed, as well as possible conflicts due to the dual representation by defendants in these matters, a genuine issue of material fact regarding causation may have existed on this record. These are issues to be ferreted out through the discovery process and we conclude that the trial court erred when it granted defendants' motion for summary disposition prior to the close of discovery.

III

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition because the determination of the deadline for plaintiff to timely file its claim with MDOT and the interpretation of the surety agreement between plaintiff and INA were genuine issues of material fact that were inappropriate for the trial court's resolution. We review de novo the proper construction and interpretation of a contract, which is a question of law. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

A.

In particular, plaintiff asserts that the trial court erred in finding that it lost its right to pursue additional compensation from MDOT on April 6, 1997. Generally, collateral estoppel is a rule of issue preclusion. It bars the "relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). "A decision is final when all appeals have been exhausted or when the time available for an appeal has passed." *Id.*

Under the subcontract between plaintiff and Toebe, Toebe retained the exclusive right to bring plaintiff's claims for additional compensation to MDOT. However, the record shows that, on March 22, 1999, plaintiff and Toebe entered into an "Agreement for Joint Representation of Claim," by which:

2. Toebe agrees to present Artco's claim for extra work incurred under the Subcontract ("Artco's Claim") in accordance with MDOT's internal claim procedures and, if necessary, in an action against MDOT in the Michigan Court of Claims together with Toebe's claim for additional compensation.

Pursuant to the agreement between plaintiff and Toebe, Toebe submitted a claim for additional compensation to MDOT on behalf of both Toebe and plaintiff. MDOT subsequently denied the claim, and administrative review by MDOT's Central Office Review (COR) upheld

the denial. Subsequently, Toebe instituted litigation in the Court of Claims against MDOT to recover the additional compensation claimed. The court granted summary disposition in favor of MDOT, finding that because Toebe failed to file a timely claim for compensation within 60 days of the completion date of the contract, December 5, 1996, MDOT's COR properly denied the claim. A panel of this Court later affirmed the lower court's ruling. *Walter Toebe Constr Co v Dep't of Transportation*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2004 (Docket No. 244356). Because plaintiff was in privity with Toebe in the prior litigation,¹ and the issue of when the claims for additional compensation were lost was finally, actually, and necessarily determined in that litigation, plaintiff is collaterally estopped from relitigating the issue in a claim against defendants² on appeal.

In sum, because the Court of Claims and this Court had already determined that Toebe's right to pursue its claim was lost on April 6, 1997, and Toebe represented plaintiff's interest in the litigation pursuant to the settlement agreement between the parties, plaintiff is collaterally estopped from relitigating this issue.

B.

Plaintiff also argues that the trial court erred in its interpretation of the suretyship agreement between plaintiff and INA. Generally, a surety contract is governed by standard principles of contract interpretation. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). In general, the intent of the parties to a contract is to be ascertained from the clear language of the contract. "[U]nambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). In this case, the language of the surety agreement between plaintiff and INA states that:

The Principals, the Indemnitors hereby consenting, will assign, transfer and set over, and do hereby *assign*, transfer and set over to the Surety, as collateral, to secure the obligations in any and all of the paragraphs of the Agreement . . . (a) All the rights of the Principals in, and growing in any manner out of, all contracts referred to in the Bonds, or in, or growing in any manner out of the Bonds [.] [Emphasis added.]

¹ "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v Michigan*, 470 Mich 105, 122; 680 NW2d 386 (2004).

² We recognize that defendants in the instant case were not a part of the prior litigation. However, the absence of mutuality does not always preclude application of collateral estoppel. *Monat v State Farm Ins Co*, 469 Mich 679, 688; 677 NW2d 843 (2004). In *Monat*, our Supreme Court held that "where collateral estoppel is being asserted . . . against a party who has already had a full and fair opportunity to litigate the issue, mutuality is not required." *Id* at 695.

The agreement clearly states that plaintiff will “assign” “[a]ll of the rights” it has in any contracts growing out of the project. Although the purpose of the assignment is as collateral for INA’s agreement to indemnify plaintiff on default, the clear language of the contract nevertheless plainly constitutes an assignment of plaintiff’s contractual interest in the pursuit of its additional compensation from MDOT. Moreover, the record supports a finding that plaintiff believed that it had forfeited its right to INA to pursue its claim with MDOT at the time that it defaulted on its obligations under the subcontract with Toebe. Specifically, the record contains a letter from defendant Keranen, plaintiff’s legal counsel, “tender[ing] to you [INA] performance of the contract and all of our rights thereunder” and offering to “execute any and all documents you [INA] may require to effect the transfer of such rights to you.” Therefore, plaintiff’s understanding of the contractual provision comports with the clear language of the agreement.

In sum, the clear language of the suretyship agreement, as well as plaintiff’s understanding of the assignment provision, indicate that plaintiff had assigned its right to pursue its claim with MDOT to INA on default, and no genuine issue of material fact existed.

IV

Plaintiffs next contend that the trial court erred in denying its motion for leave to amend its complaint to add an additional count of breach of duty against defendants for failing to file a civil suit against Toebe. Generally, we “will not reverse a trial court’s decision to deny leave to amend pleadings unless it constituted an abuse of discretion.” *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 53; 684 NW2d 320 (2004). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Maldonado v Ford Motor Co.*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

In general, when a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), it must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile. MCR 2.116(I)(5); *Yudashkin v Linzmeyer*, 247 Mich App 642, 651; 637 NW2d 257 (2001). “An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim.” *Lane v KinderCare Learning Ctr, Inc.*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

In this case, the subcontract between plaintiff and Toebe contained the following provision:

5. Payment. Principal Contractor agrees to remit payment to Subcontractor for such completed work when payments for such work are received by Principal Contractor from the Department of Transportation Subcontractor agrees that payment by the Department of Transportation to Principal Contractor for work performed by Subcontractor shall be a condition precedent to any payment obligation of the Principal Contractor to Subcontractor. Subcontractor agrees to accept as final all determinations of amounts and quantities made by the Department of Transportation for such work and shall have no claim whatever against Principal Contractor in excess of payments actually

received by Principal Contractor for such work from the Department of Transportation

As previously noted, generally, the intent of the parties to a contract is to be ascertained from the clear language of the contract. “[U]nambiguous contracts are not open to judicial construction and must be *enforced as written*.” *Rory, supra* at 468. Furthermore, Michigan law “presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents.” *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 184; 405 NW2d 88 (1987).

The plain language of the subcontract between plaintiff and Toebe indicates that plaintiff was to be paid only if MDOT compensated Toebe. Michigan courts have upheld “pay when paid” requirements in construction contracts. See, e.g., *Berkel & Co Contractors v Christman Co*, 210 Mich App 416; 533 NW2d 838 (1995). Even though previous adjudications determined that MDOT properly denied Toebe’s claim for compensation for itself and plaintiff, questions of fact exist regarding defendants’ dual representation and the timing involved in the institution of plaintiff’s suits. Thus, the fact that Toebe ultimately did not receive additional compensation from MDOT for the services that were performed on the construction contract is not an automatic bar to plaintiff’s recovery since questions of fact exist regarding defendants’ representation of plaintiff throughout the process. For these reasons, plaintiff may be able to show that defendants’ asserted negligence proximately caused an injury to plaintiff and the trial court erred when it denied plaintiff’s motion to amend its complaint to add a breach of duty count against defendants for failure to file a civil suit against Toebe as futile.

V

Plaintiff’s final argument on appeal is that the trial court erred in permitting defendants to file a brief in opposition to plaintiff’s motion for reconsideration and in denying plaintiff’s motion to strike defendants’ responsive brief. This issue requires us to determine whether the trial court properly interpreted MCR 2.119(F)(3) to allow defendants to file a responsive brief. To the extent that the resolution of the case depends on the interpretation of a court rule, our standard of review is de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004). Further, we “review[] a trial court’s decision regarding a motion to strike a pleading pursuant to MCR 2.115 for an abuse of discretion.” *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003).

Plaintiff asserts that the trial court erred in directing defendants to file a brief in response to its motion for reconsideration. MCR 2.119(F) provides for motions for rehearing or reconsideration. In relevant part, the rule states:

(1) Unless another rule provides a different procedure for reconsideration of a decision . . . a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion.

(2) No response to the motion may be filed, and there is no oral argument, *unless the court otherwise directs* [MCR 2.119(F)(1) and (2) (emphasis added).]

It is clear from the language of the court rule that the lower court is empowered to direct a party to file a response to another party's motion for reconsideration. Therefore, the trial court did not err in directing defendants to file a responsive brief.

Plaintiff also argues that the trial court erred in denying its motion to strike defendants' brief in response to its motion for reconsideration pursuant to MCR 2.115(B). Indeed, MCR 2.115(B) provides: "[o]n motion by a party or on the court's own initiative, the court may strike *from a pleading* redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules" (emphasis added). But, MCR 2.110(A) defines the term "pleading" as follows: "(1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer." Because MCR 2.110(A) does not define a responsive brief as a pleading, MCR 2.115(B) did not grant the trial court the authority to strike defendant's responsive brief, and the trial court did not err.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto